Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JOSEPH W. HAMPTON,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, Second Judicial District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Whether defendant was denied his right to defend against the charges against him and the right to the effective assistance of counsel when the trial judge declared him guilty without affording him an opportunity to present closing argument?

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I.

THE APPELLATE COURT IN THIS CASE HAS DEPRIVED MR. HAMPTON OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY FINDING THAT THIS COURT'S OPINION IN *HERRING v. NEW YORK*, 422 U.S. 853, 45 L.Ed.2d 593, 95 S.Ct. 2550 (1975) ALLOWS FOR WAIVER OF THE FUNDAMENTAL RIGHT TO PRESENT CLOSING ARGUMENT MERELY BECAUSE THE OPINION DOES NOT EXPLICITLY REJECT WAIVER. ADDITIONALLY, EVEN IF THIS FUNDAMENTAL RIGHT CAN BE WAIVED, WAIVER WAS WRONGLY APPLIED TO THIS CASE 4

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Joseph W. Hampton, respectfully prays that a Writ of Certiorari issue to review the judgment and order of the Appellate Court of Illinois, Second Judicial District, which was entered on July 3, 1996.

OPINION BELOW

The modified Illinois Supreme Court Rule 23 (unpublished) order of the Appellate Court of Illinois, Second District, on denial of petitioner's petition for rehearing entered on July 3, 1996, is reproduced in the Appendix to this Petition.

JURISDICTION

The order and judgment of the Appellate Court of Illinois, Second Judicial District, was entered on July 3, 1996. On October 2, 1996, the Illinois Supreme Court denied a Petition for Leave to Appeal. This Petition for Writ of Certiorari is filed within 90 days of that date. United States Supreme Court Rule 13(1). The decision of the Appellate Court of Illinois, Second Judicial District was in contravention of federal constitutional law, in particular the Sixth Amendment to the United States Constitution. Accordingly, the jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution - Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .[,] to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

On August 20, 1991, petitioner Joseph W. Hampton, pleaded guilty to two counts of Attempted Murder, two counts of Armed Robbery and two counts of Aggravated Battery. (C. 49). Following sentencing defendant made a motion to withdraw his guilty pleas and to vacate the judgments of convictions which was denied. Mr. Hampton appealed to the Appellate Court of Illinois, Second District, and that court reversed and remanded the case finding the trial court did not properly admonish defendant pursuant to Illinois Supreme Court Rule 402. *People v. Hampton*, 249 Ill. App. 3d 873, 620 N.E.2d 3 (2nd Dist. 1993).

Upon remand the case proceeded to a bench trial. A Motion to Suppress Evidence was also heard simultaneous to the trial. The evidence at trial was that on August 24, 1990, Michael Lichter and his eleven-year-old daughter went outside for a walk. As they walked they were attacked and robbed by two men and both were seriously injured. The investigation led to Mr. Hampton who ultimately gave a written statement.

In his statement, Mr. Hampton said that he and his co-defendant, Jayme Sebers, were at Hampton's house drinking when they started to drive around. They saw a man and a girl walking and Sebers said they should hit the man with the car in order to rob him. Sebers drove the car and struck the man and Sebers and Mr. Hampton then got out of the vehicle. Sebers robbed the man as Hampton struck the girl on the head with an axe handle because she was crying. The two men continued to beat the victims and then left. Mr. Hampton's car was found with blood on it which could have matched the victims'.

Following the testimony regarding the evidence about the crime, Terry Tichava, Chief Deputy of the Kendall County Sheriff's Office, testified regarding the arrest of Mr. Hampton for the Motion to Quash and Suppress. Tichava testified he was voluntarily allowed into Hampton's home while Hampton's mother testified that Tichava walked in uninvited.

The court found that Mr. Hampton's confession was voluntary and not the fruit of an unlawful arrest or search of his car. The court found there was no expectation of privacy in the car and overruled objections to Mr. Hampton's confession on the basis of chain of custody. The court then immediately found Mr. Hampton guilty of the attempted murder of Michael Lichter, the attempted murder of Lauren Lichter, armed robbery and two counts of aggravated battery. Following a hearing the court sentenced Mr. Hampton to 30 years for each attempted murder to run consecutive to each other and to the armed robbery sentence of 30 years for a total of 90 years, and a concurrent term of 10 years for aggravated battery.

REASON FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

THE ILLINOIS APPELLATE COURT IN THIS CASE HAS DEPRIVED MR. HAMPTON OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY FINDING THAT THIS COURT'S OPINION IN *HERRING v. NEW YORK*, 422 U.S. 853, 45 L.Ed.2d 593, 95 S.Ct. 2550 (1975), ALLOWS FOR WAIVER OF THE FUNDAMENTAL RIGHT TO PRESENT CLOSING ARGUMENT MERELY BECAUSE THE OPINION DOES NOT EXPLICITLY REJECT WAIVER. ADDITIONALLY EVEN IF THIS FUNDAMENTAL RIGHT CAN BE WAIVED, WAIVER WAS WRONGLY APPLIED TO THIS CASE.

The Appellate Court of Illinois, Second Judicial District, incorrectly interpreted and applied this Court's opinion in *Herring v. New York*, 422 U.S. 853, 45 L.Ed.2d 593, 95 S.Ct. 2550 (1975), and the Sixth Amendment to the United States Constitution. It found that because *Herring* did not explicitly reject waiver in its opinion, a defendant's fundamental right to present closing argument can be waived by actions or inaction on the part of counsel.

In reaching its decision in *People v. Hampton*, No. 2-95-0123 (filed July 3, 1996), the Appellate Court, Second District, stated:

> "Because we do not believe that *Herring* stands for the proposition that the right to present closing argument is unwaivable, we hold that defense counsel waived the right to closing argument."

Hampton, No. 2-95-0123, p. 3. However the court failed to address the question of whether *Herring* allows for the

waiver of this fundamental right. Although two Illinois cases relied upon by the *Hampton* court cite *Herring* for the proposition that the right to closing argument can be waived by the failure of counsel to seek closing argument (*People v. Riley*, 219 Ill. App. 3d 482, 494, 579 N.E.2d 1008 (1st Dist. 1991); *People v. Coleman*, 212 Ill. App. 3d 997, 1004, 571 N.E.2d 1035 (1st Dist. 1991)), a clear reading of *Herring* reveals that nowhere in the decision does this Court state that this fundamental right can be waived.

Additionally, even if the right to present closing argument can be waived it clearly was not in this case. Where the trial court improperly curtails a defense counsel's closing argument, thereby denying him the full benefit of his constitutional right to effective assistance of counsel, reversal of that conviction is proper. In this case the trial court ruled on a motion to suppress and several evidentiary issues and then immediately declared defendant guilty. No opportunity was afforded counsel to present argument. The Appellate Court, Second District, stated:

> "Defense counsel did not attempt, at trial, to seek closing argument. Defense counsel did not object at the time the trial court began to make findings nor did he request to make closing argument."

However, the trial court never "began" to make findings, it simply declared defendant guilty. At that point any opportunity for closing argument was gone.

By finding waiver in this case, the Appellate Court, Second District, has effectively placed in the hands of the trial court the decision of whether to hear or not to hear closing argument. If the court declares defendant guilty

before argument, it is waived. Such a holding is impossible to reconcile with this Court's decisions placing the burden on the State in a criminal case of establishing a valid waiver of a fundamental right. See, e.g., *Michigan v. Jackson*, 475 U.S. 625, 633, 106 S.Ct. 1404, 1409, 89 L.Ed.2d 631 (1986). Since this Court has not expressly stated that the right to present closing argument can be waived, or in what manner a waiver can occur, the petitioner respectfully asks this Court to give its guidance on this important issue.

CONCLUSION

For all the reasons discussed herein, a Writ of Certiorari should issue to review the decision of the Illinois Appellate Court, Second District.

Respectfully submitted,

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APPENDIX

App. 1

[Filed July 3, 1996]

THIS ORDER IS NOT PRECEDENTIAL
AND IS NOT TO BE CITED

2-95-0123

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kendall County,
Plaintiff-Appellee,	)	
v.	)	No.: 90 CF 91 90 CF 92 90 CF 93 91 CF 20
JOSEPH W. HAMPTON,	)	Honorable James L. Wilson,
Defendant-Appellant.	)	Judge, Presiding.

MODIFIED RULE 23 ORDER ON DENIAL
OF PETITION FOR REHEARING

On August 20, 1991, Joseph W. Hampton (defendant), along with Jayme P. Sebers, pleaded guilty to two counts of attempted murder, two counts of armed robbery, and two counts of aggravated battery. Defendant's motion to withdraw guilty pleas and to vacate judgments of convictions and defendant's motion to reconsider sentence were denied. Defendant appealed. On September 2, 1993, this court reversed, finding the trial court failed to properly admonish defendant pursuant to Supreme Court Rule 402.

On October 27, 1994, after a bench trial, the trial court found defendant guilty of two counts of attempted murder, two counts of aggravated battery, and armed robbery. Defendant was sentenced to consecutive prison terms of 30 years for each count of attempted murder and for the armed robbery count for a total of 90 years' imprisonment with a concurrent term of 10 years' imprisonment for aggravated battery. Defendant appeals.

On appeal, defendant argues: (1) he was denied his right to defend against the charges against him when the trial judge declared him guilty without affording him an opportunity to present closing argument; (2) the trial court erred when it (a) denied him the opportunity to impeach a State's witness for purposes of his motion to quash arrest and suppress evidence, (b) admitted irrelevant and incompetent evidence, and (c) determined that defendant's sentence for armed robbery must be served consecutively to his sentences for attempted murder; and (4) the trial court abused its discretion in sentencing him to consecutive extended term sentences totalling 90 years' imprisonment where the court failed to consider mitigating factors. We disagree and we affirm.

First, defendant argues that he was denied his right to defend against the charges against him when the trial judge declared him guilty without affording him an opportunity to present closing argument.

"The right to present closing argument at trial is of constitutional magnitude, regardless of whether the trial is before a judge or jury or whether the defendant is represented by counsel of represent himself." *People v. Smith*, 249 Ill. App. 3d 460, 465 (1993), citing *Herring v. New York*, 422 U.S. 853, 45 L. Ed. 2d 593, 95 S. Ct. 2550

(1975). Therefore, where the trial court improperly curtails "defense counsel's closing argument, thereby denying him the full benefit of his constitutional right to effective assistance of counsel," reversal is compelled. *People v. Smith*, 205 Ill. App. 3d 153, 156 (1990). Nevertheless, "[t]he right to closing argument can be waived." *People v. Riley*, 219 Ill. App. 3d 482, 494 (1991).

We determine that the trial court did not improperly curtail defense counsel's closing argument. Defense counsel made no attempt, at trial, to seek closing argument. Defense counsel did not object at the time the trial court began to make findings nor did he request to make closing argument. Although defendant did raise the issue in his post-trial motion, it cannot be said that defense counsel was denied the opportunity to make closing argument. See *People v. Coleman*, 212 Ill. App. 3d 997, 1004 (1991). Because we do not believe that *Herring* stands for the proposition that the right to present closing argument is unwaivable, we hold that defense counsel waived the right to closing argument.

Next, defendant argues that the trial court erred in denying him the opportunity to impeach a State's witness for purposes of his motion to quash arrest and suppress evidence. Specifically, defendant contends that it was error for the trial court to not allow into evidence a University of Illinois State Water Survey (Survey) attempting to impeach Officer Tichava's (Tichava) testimony that it "started to rain" or "started to sprinkle" on the date in question.

It is well established that

> "where a witness' credibility is crucial, the trial court should permit the parties wide latitude in impeach-

> ing and rehabilitating the witness' credibility so that the jury can gain access to all necessary information and impressions in order to evaluate credibility. [Citation.] Matters of impeachment are within the trial court's sound discretion, and a reviewing court should not interfere unless there has been a clear abuse of discretion resulting in manifest prejudice to the defendant." *People v. Morando*, 169 Ill. App. 3d 716, 730 (1988).

It has recently been stated that "a defendant has the right to question a prosecution witness regarding any matter which goes to explain, modify, or discredit the witness' testimony ***." *People v. Harris*, 262 Ill. App. 3d 35, 45 (1994).

However, "[t]he purpose of impeaching evidence is to destroy the credibility of a witness, not to establish the truth of the impeaching evidence." *People v. Redd*, 135 Ill. 2d 252, 316-17 (1990). "The exclusion of evidence is neither prejudicial nor grounds for reversal where the same or substantially the same evidence is admitted at some stage of the trial." *People v. Campbell*, 126 Ill. App. 3d 1028, 1052 (1984).

We determine that the trial court did not err when it denied defendant the opportunity to impeach Tichava for purposes of defendant's motion to quash arrest and suppress evidence. First, it is arguable that the proposed evidence is irrelevant. The proposed evidence declared that there was no precipitation on the date in question at the reporting station at Aurora College. However, defendant was attempting to prove that it did not rain at his home in Boulder Hill, Illinois. Furthermore, it can be argued that the issue of whether it was raining on the date in question is a collateral matter and may not be

impeached. See *People v. Breton*, 237 Ill. App. 3d 355, 364 (1992).

Second, any error that may have resulted from the exclusion of the Survey from evidence must be viewed as harmless. Testimony which was substantially similar to the Survey was admitted at trial. Specifically, Officer Harris testified that on the date in question the weather was "clear." Defendant's mother testified that on the date in question, the weather was "pleasant." The Survey can only be viewed as cumulative evidence and its admission would not have changed the result of the motion to quash arrest and suppress evidence. We conclude that the exclusion of the Survey from evidence was neither prejudicial to defendant nor does it constitute grounds for reversal. See *Campbell*, 126 Ill. App. 3d at 1052.

Defendant also argues that the trial court erred by admitting irrelevant and incompetent evidence.

> "Real evidence is admissible when an adequate foundation is laid to establish that the item is the one involved in the alleged offense and is substantially unchanged since its seizure by authorities. [Citation.] When the evidence is not readily identifiable or is susceptible to alteration, the State must show a chain of custody of sufficient completeness to render it improbable that the item has been tampered, exchanged, or contaminated." *People v. Slaughter*, 149 Ill. App. 3d 183, 186 (1986).

However, "[w]hen the competent evidence in the record establishes the defendant's guilt beyond a reasonable doubt and it can be concluded that retrial without the erroneous admission of the challenged evidence would produce no different result, the conviction may be affirmed." *People v. Arman*, 131 Ill. 2d 115, 124 (1989).

After reviewing the record, we find it unnecessary to determine whether the trial court improperly admitted the following into evidence: (1) testimony regarding Officer Harris' search for a one hundred dollar bill at defendant's home; and (2) testimony regarding the gym shoe found at the scene. This is true because we determine that even without the admission of the alleged improper evidence, overwhelming evidence exists that proves defendant's guilt beyond a reasonable doubt. In other words, even if the trial court improperly admitted the evidence, we determine that "retrial without the erroneous admission of the challenged evidence would produce no different result." *Arman*, 131 Ill. 2d at 124. Therefore, we may affirm defendant's conviction. See *Arman*, 131 Ill. 2d at 124.

Defendant further argues that the trial court erred when it determined that his sentence for armed robbery must be served consecutively to his sentences for attempted murder. The relevant statute states:

> "The court shall not impose consecutive sentences for offenses which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective, unless, one of the offenses for which defendant was convicted was a Class X or Class 1 felony and the defendant inflicted severe bodily injury, ***, in which event the court shall enter sentences to run consecutively." 730 ILCS 5/5-8-4(a) (West 1994).

"In determining whether the defendant's actions constituted a single course of conduct, courts will often examine the motivations behind those actions." *People v. Morris*, 237 Ill. App. 3d 140, 146 (1992). "Thus, in imposing consecutive sentences, the court in *Stokes* [*People*

v. Stokes, 172 Ill. App. 3d 534, 537 (1988)] examined the record for the existence of separate and distinct acts and then sought to determine whether separate motivations existed behind those acts." *Morris*, 237 Ill. App. 3d at 146. Nevertheless, "[n]ot all crimes involving multiple acts are deemed to be the result of independent motivations." *Morris*, 237 Ill. App. 3d at 146. Furthermore, "we note that there is no need to object to a sentencing error in order to preserve the error for review." *People v. Allen*, 268 Ill. App. 3d 947, 951 (1994).

The relevant part of the sentencing order states:

> "4. that the Class X offenses of Armed Robbery *** and the two (2) separate offenses of Attempt Murder *** were committed by the defendant as part of a single course of conduct during which there was no substantial change in the nature of the defendant's criminal objective *AND* that the defendant inflicted severe bodily injury upon both victims." (Emphasis in original.)

Defendant argues that at the sentencing hearing the trial court did not make appropriate determinations regarding course of conduct, motivation, and bodily injury. However, the plain language of the sentencing order demonstrates otherwise. Furthermore, the trial court made an explicit finding that defendant inflicted severe bodily injury upon both victims. Therefore, the consecutive sentencing provision was mandatory.

We find defendant's reliance on the case of *People v. Bole*, 155 Ill. 2d 188 (1993), to be misplaced. In that case, the defendant's convictions stemmed from three counts of criminal sexual assault which occurred on three separate dates. The *Bole* court found the defendant's acts were committed in separate courses of conduct thereby

precluding application of section 5-8-4(a). *Bole*, 155 Ill. 2d at 199. After a careful review of the entire record and the case law, we determine that the trial court did not err when it determined defendant's sentence for armed robbery must be served consecutively to the similarly consecutive sentences for attempted murder.

Furthermore, Defendant argues that under *People v. Ivey*, 267 Ill. App. 3d 310 (1994), his consecutive sentences were improper. However, we find *Ivey* to be distinguishable from the case at bar. In *Ivey* at page 312, the court held that were the defendant has been convicted of multiple offenses committed as part of a single course of conduct, including one which triggers the mandatory consecutive sentencing provision of section 5-8-4, the sentence for every offense need not be consecutive to *every other* offense arising from that course of conduct, even where only one is a "triggering" offense. In other words, section 5-8-4 (a) mandates consecutive sentencing only for the triggering offence. In this case, each offense constitutes a triggering offense. Therefore, under the plain language of the statute, the trial court had the authority to impose consecutive sentences for each offense.

Last, defendant argues that the trial court abused its discretion in sentencing him to consecutive extended term sentences totaling 90 years' imprisonment where the court failed to consider mitigating factors. Specifically, defendant argues that the trial court failed to consider that (1) he completed his high school education while in jail despite a learning disability; (2) he expressed remorse; and (3) he had been an exemplary prisoner while in the penitentiary.

"[O]ur decisions have firmly established that the imposition of a sentence is a matter of judicial discretion and that, absent an abuse of this discretion, the sentence of the trial court may not be altered upon review." *People v. Perruquet*, 68 Ill. 2d 149, 153 (1977).

> "This court will not disturb a sentence imposed by the trial court unless it clearly appears that the penalty constitutes a great departure from the fundamental law and its spirit and purpose. [Citation.] In this State, the spirit and purpose of the law are upheld when a sentence reflects the seriousness of the offense and gives adequate consideration to the rehabilitative potential of the defendant." *People v. Heflin*, 71 Ill. 2d 525, 545 (1978).

Furthermore,

> "[w]hen a reviewing court is requested to exercise its power to reduce a sentence, that power must be exercised cautiously and the court will not engage in mere judicial clemency. [Citation.] A reviewing court cannot substitute its judgment for that of the trial court simply because it would have balanced the factors differently." *People v. Green*, 233 Ill. App. 3d 298, 303 (1992).

This is true because,

> "[a] trial judge is in a far better position than an appellate court to fashion an appropriate sentence, because such judge can make a reasoned judgment based upon firsthand consideration of such factors as 'the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age' [citations]; whereas the appellate court has to rely entirely on the record [citation]." *People v. Streit*, 142 Ill. 2d 13, 19 (1991), quoting *Perruquet*, 68 Ill. 2d at 154.

Finally, a trial judge's sentencing decision is presumed to be based on proper legal reasoning "unless there is some statement in the record, aside from the sentence imposed, which would tend to indicate otherwise." *People v. Goodman*, 116 Ill. App. 3d 125, 128 (1983).

Defendant's argument relies almost entirely on the following statement made by the trial court. "That the only possible mitigating factor as to the defendant Hampton who was only 19 years of age at the time of the present crimes is that he has no history of a prior delinquency or criminal activity." A careful review of the record indicates that the trial court considered defendant's potential for rehabilitation before making this statement.

Furthermore, the plain language of the sentencing order demonstrates that the trial court properly considered mitigating factors in sentencing defendant. The relevant portion of the sentencing order states:

> "2. That the Court has considered all the relevant factors in aggravation, *** as well as having considered the relevant factors in mitigation, including but not limited to the defendant's age (19 at the time of these offenses) and the lack of a history of prior delinquency or criminal activity."

The order states that the mitigating factors are not limited to the ones enumerated in the order. Therefore, it cannot be stated that the trial court failed to consider other mitigating factors. Defendant's argument must fail.

In terms of the actual sentence imposed, it must be remembered that it is not this court's function to reweigh the relevant sentencing factors. Nevertheless based on the facts of the present case, we determine that it was eminently reasonable for the trial court to sentence de-

fendant to consecutive extended term sentences totalling 90 years' imprisonment. The mitigating factors defendant discusses all have one thing in common: They all occurred after the commission of a particularly brutal and heinous crime. It is not out of the realm of possibility that the sole impetus for defendant's "exemplary" behavior was the desire to receive a favorable sentence. In light of the great deference bestowed upon a trial court's sentencing decision, we conclude that the trial court did not abuse its discretion in sentencing defendant.

For the foregoing reasons, the judgment of the circuit court of Kendall County is affirmed.

HUTCHINSON, J., with DOYLE and THOMAS, JJ., concurring.

(Letterhead of)

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October 2, 1996

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No. 81494 – People State of Illinois, respondent, v. Joseph W. Hampton, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 24, 1996.